

IN THE
SUPREME COURT OF MISSOURI

RODNEY CREIGHTON,)	
)	
Appellant,)	
)	
vs.)	SC95527
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
DIVISION EIGHT,
THE HONORABLE ELIZABETH BYRNE HOGAN
JUDGE AT POST-CONVICTION PROCEEDINGS

APPELLANT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the order of the Honorable Elizabeth Byrne Hogan, division 15 of the Circuit Court of the City of St. Louis, denying the Rule 29.15 motion for post-conviction relief Rodney Creighton, Appellant herein, filed in 1322-CC00229. In that post-conviction case, Mr. Creighton sought relief from the sentence and judgment the Honorable Lisa Van Amburg, division 19 of the Circuit Court of the City of St. Louis, imposed and executed in his underlying criminal case, 1022-CR00314-01.

In that underlying criminal case, 1022-CR00314-01, Judge Van Amburg found Mr. Creighton guilty, pursuant to a jury trial, of committing the following offenses as a prior and persistent offender: a) three counts of the class A felony of robbery in the first degree in violation of § 569.020 RSMo; b) three counts of the unclassified felony of armed criminal action in violation of § 571.015 RSMo; and c) one count of the class D felony of resisting arrest in violation of § 575.150 RSMo. Subsequently, Judge Van Amburg sentenced Mr. Creighton to serve twenty-five years in the Missouri Department of Corrections on each of the robbery first counts, ten years in the Missouri Department of Corrections on each of the armed criminal action counts, and seven years in the Missouri Department of Corrections on the resisting arrest count with said sentences to run concurrently.

Mr. Creighton appealed the sentence and judgment Judge Van Amburg imposed and executed in 1022-CR00314-01 to the Missouri Court of Appeals for the Eastern District in ED97599. The Eastern District denied the appeal in a mandate handed down on December 13, 2012.

After the Eastern District denied that appeal, Mr. Creighton timely filed his Rule 29.15 motion for post-conviction relief in 1322-CC00219. He filed that motion on January 17, 2013. Undersigned counsel then filed an Amended Motion on his behalf on August 28, 2013. On August 11, 2014, Judge Hogan entered an order denying Appellant's Rule 29.15 motion for post-conviction relief without holding an evidentiary hearing on the matter.

Mr. Creighton then appealed Judge Hogan's ruling to the Missouri Court of Appeals for the Eastern District in ED102030. The Eastern District did not reach the merits of this appeal. Instead, it filed a published opinion in which it found that the Amended Motion that was filed in Appellant's Rule 29.15 case was untimely and that the case needed to be remanded for a hearing on whether Undersigned Counsel abandoned Mr. Creighton by filing an untimely Amended Motion. Mr. Creighton then sought and obtained transfer to this Court pursuant to Rules 83.04 and 83.05 and Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

Facts from Mr. Creighton's Underlying Case (1022-CR00314-01)

In Mr. Creighton's underlying case, 1022-CR00314-01, the state filed a substitute information in lieu of indictment in which it alleged that he committed nine different offenses. (D.A.L.F. 41-44)¹. In Counts I-VI, the state alleged that Mr. Creighton took three women's purses and the contents of those purses at gunpoint and thereby committed three counts of robbery in the first degree in violation of § 569.020 RSMo² and three counts of armed criminal action in violation of § 571.015 RSMo. In Counts VII and VIII, the state alleged that Mr. Creighton took a man's wallet, the contents of the wallet, U.S. currency, and an automobile at gunpoint and thereby committed one count of robbery in the first degree in violation of §569.020 RSMo and one count of armed criminal action in violation of § 571.015 RSMo. In Count IX, the state alleged that as police officers attempted to arrest Mr. Creighton for the felony of tampering in the first degree, he fled from the officers for the purpose of resisting arrest and thereby committed one count of the class D felony of resisting arrest in violation of § 575.150 RSMo. The case went to trial the week of August 22, 2011.

The state presented evidence that at around 1:30 a.m. on January 17, 2010, Pamela Edmond, Brandy Holley, and Marcee Phipps were leaving a bowling alley and

¹ The record on appeal consists of the Legal File from 1322-CC0029, (P.C.R.L.F.), the Legal File from ED97599, (D.A.L.F.), and the transcript of Appellant's trial in 1022-CR00314-01, (Tr.).

² All statutory references are to Missouri Revised Statutes 2000 unless otherwise noted.

walking towards their cars when a man approached them and demanded their purses at gunpoint. (Tr. 69-71, 77-79, 85-86). All three women said the man had a pistol. (Tr. 71, 79, 86). Ms. Holley and Ms. Phipps said the man had a silver colored pistol. (Tr. 79, 96). All three women eventually threw their purses on the ground. (Tr. 72, 79-80, 86-87). The man then grabbed their purses and left. (Tr. 72, 87).

The state also presented evidence that at around 2:30 a.m. on January 17, 2010, Timothy Dall was leaving a “Christmas party” at the Lumen Center Banquet Hall and had entered his car when a man with a gun approached him, carjacked him, and took U.S. currency and a wallet in his possession. (Tr. 93-94). Dall admitted that he did not see the man’s face or notice his clothing. (Tr. 97).

On January 19, 2010, police officers noticed Dall’s car parked on 20th Street and Holly Avenue, noticed it was on the hot list, and contacted Detective Michael Minor. (Tr. 100-101). Detective Michael Minor and his partner then responded to the location of the car and began conducting surveillance on it. (Tr. 101). While conducting surveillance, they observed Mr. Creighton get in the car and begin to drive away. (Tr. 102). The officers then began following Mr. Creighton and activated their sirens and emergency lights. (Tr. 102). At that point, Mr. Creighton fled at a high rate of speed for approximately three quarters of a mile until he lost control of the car in the 2400 block of Parnell. (Tr. 102). When this happened, the officers ordered Mr. Creighton to exit the car. (Tr. 102-103). Mr. Creighton refused to comply and tried to restart the car, but the officers were able to take him into custody. (Tr. 103).

Thereafter, Detective David King and Detective Timothy Torrence questioned Mr. Creighton. (Tr. 111, 114). Mr. Creighton said that he bought Dall's car from a "white guy" for \$250. (Tr. 111-112). Mr. Creighton said that he believed that the "white guy" was going to use the money to buy drugs. (Tr. 111-112, 114). At some point, Detective King created a photographic line-up that included Dall's picture. (Tr. 115). Mr. Creighton selected Dall as the person who allegedly sold him the car. (Tr. 115).

The police then placed Mr. Creighton in a lineup. (Tr. 109). Pamela Edmond, Brandy Holley, and Marcee Phipps all identified Mr. Creighton as the man who had robbed them. (Tr. 81). There was also evidence that these three women's purses were recovered in the area of 1521 Carr and that this location was approximately 7 or 8 blocks from the location of the bowling alley the women were leaving when they got robbed, (Tr. 112), and 7 or 8 blocks from where Mr. Dall was when he got robbed and carjacked. (Tr. 112).

Mr. Creighton testified at trial and denied robbing Pamela Edmonds, Brandy Holley, Marcee Phipps, and Timothy Dall. (Tr. 129-131). He stated that he picked Timothy Dall from the lineup because the police told him that they would release him if he picked anyone from the lineup. (Tr. 131). He also stated that he did not run from the police and explained that he was speeding because he had heard a shot. (Tr. 132-133).

At the close of all the evidence, the jury found Mr. Creighton guilty of Count I-VI, the robbery in the first degree and armed criminal action counts pertaining to the robberies of Pamela Edmond, Brandy Holley, and Marcee Phipps. (D.A.L.F. 122). The jury acquitted him of Counts VII and VIII, the robbery in the first degree and armed

criminal actions counts pertaining to the robbery and carjacking of Timothy Dall. (D.A.L.F. 123). The jury also found him guilty of Count IX, the count pertaining to the resisting arrest charge. (D.A.L.F. 123). Subsequently, Judge Van Amburg sentenced Mr. Creighton to serve twenty-five years in the Missouri Department of Corrections on each of the robbery first counts he was found guilty of, ten years in the Missouri Department of Corrections on each of the armed criminal action counts he was found guilty of, and seven years in the Missouri Department of Corrections on the resisting arrest count he was found guilty of. (D.A.L.F. 124-127). Judge Van Amburg ran all of these sentences concurrent. (D.A.L.F. 124-127).

Facts from Mr. Creighton's Rule 29.15 Motion (1322-CC00229)

In 1322-CC0229, Mr. Creighton filed a Rule 29.15 motion seeking to vacate the sentence and judgment the Honorable Lisa Van Amburg imposed and executed in his underlying criminal case, 1022-CR00314-01. (P.C.R.L.F. 3-29). Undersigned counsel then filed an Amended Motion on Mr. Creighton's behalf. (P.C.R.L.F. 34-48).

In that Amended Motion, Undersigned counsel asserted that Mr. Creighton's trial attorney was ineffective for failing to seek a mistrial, or in the alternative, removal of juror 510, Pearlie Turner, for intentional nondisclosure. (P.C.R.L.F. 36). Undersigned counsel also alleged facts in support of this claim. (P.C.R.L.F. 42-45). In addition, Undersigned counsel attached Mr. Creighton's Rule 29.15 motion and specifically requested the motion court to review the claims raised therein. (P.C.R.L.F. 45).

Judge Hogan then denied Mr. Creighton's Rule 29.15 motion without granting him an evidentiary hearing. (P.C.R.L.F. 76-84). With respect to his claim that his trial

attorney was ineffective for failing to seek a mistrial, or in the alternative, removal of juror 510, Pearlie Turner, for intentional non-disclosure, Judge Hogan said the following:

“This Courts finds this claim is without merit as movant has not alleged any facts that would support a finding that a mistrial would have been granted or an alternate juror should have substituted. The fact a person may have seen somebody else at some unknown place does not mean the person ‘knows’ that other person such that a response to the question asked during voir dire would have been necessary.” (P.C.R.L.F. 82).

With respect to Mr. Creighton’s request that she review the claims in his pro se Rule 29.15 motion in addition to the claims set forth in his Amended Motion, Judge Hogan refused to address them claiming that the copy of Mr. Creighton’s Rule 29.15 motion that was attached to the Amended Motion was not sufficiently legible and asserting that if Undersigned Counsel had thought that the claims raised in Appellant’s Rule 29.15 motion had merit, he should have properly presented them to the Court. (P.C.R.L.F. 83).

NOTE: Additional facts are set forth in the Argument Portion of Appellant’s Brief in order to avoid unnecessary repetition.

The Timeliness of Mr. Creighton's Amended Motion

The Eastern District found that the Amended Motion that was filed in Appellant's Rule 29.15 case, 1322-CC00229, was untimely. (see Opinion in ED102030). Mr. Creighton submits that this finding was clearly erroneous.

A. Facts pertaining to the timeliness of Mr. Creighton's Amended Motion

Mr. Creighton appealed the sentence and judgment Judge Van Amburg imposed and executed in 1022-CR00314-01 to the Missouri Court of Appeals for the Eastern District in ED97599. The Eastern District denied the appeal in a mandate handed down on December 13, 2012.

Mr. Creighton then timely filed his pro se Rule 29.15 motion to vacate, set aside, or correct the sentence or judgment in 1022-CR00314-01 on January 7, 2013. (P.C.R.L.F. 3). Subsequently, on March 8, 2013, Judge Hogan entered an order which stated the following:

The Court hereby **notifies** Scott Thompson that movant Rodney Creighton has filed a post conviction motion The motion is accompanied by an affidavit of indigency So Ordered Judge Elizabeth B Hogan.

(P.C.R.L.F. 2). On May 30, 2013, Undersigned counsel filed a motion in which he entered his appearance on Mr. Creighton's case, advised Judge Hogan that the public defender's office had received Mr. Creighton's Form 40 and determined that he was indigent, and requested an additional 30 days to complete an Amended Motion pursuant to the provisions of Rule 29.15(g). (P.C.R.L.F. 30-32). On July 26, 2013, Undersigned counsel appeared before Judge Hogan and was actually granted an additional 30 days to

complete the Amended Motion. (P.C.R.L.F. 33). Undersigned counsel then filed Mr. Creighton's Amended Motion on August 28, 2013. (P.C.R.L.F. 2)

B. Mr. Creighton's Amended Motion was timely filed

There is no issue as to whether Mr. Creighton's pro se Rule 29.15 motion was timely filed. Mr. Creighton appealed the sentence and Judgement Judge Van Amburg imposed and executed in 1022-CR00314-01 to the Missouri Court of Appeals in ED97599 and the Missouri Court of Appeals for the Eastern District issued a mandate denying that appeal on December 13, 2012. (see ED97599). Mr. Creighton then filed his pro se Rule 29.15 motion in 1322-CC00229 on January 17, 2013. (P.C.R.L.F. 3). This was well within the time period set forth by Rule 29.15(b) for the filing of such a motion³. Rule 29.15(b).

The issue is whether the Amended Motion, which was filed by Undersigned Counsel, was timely or untimely. The Eastern District found that the Amended Motion filed by Undersigned counsel was untimely. (A22⁴). The Eastern District reasoned that the motion court "**appointed**" the public defender's office to represent Mr. Creighton on

³ In relevant part, Rule 29.15(b) states as follows: "If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." Rule 29.15(b).

⁴⁴ Appellant has filed a substitute Appendix containing various documents that are numbered from A1-A32.

his Rule 29.15 motion on March 8, 2013, that Rule 29.15(g)⁵ requires appointed counsel to file an Amended Motion within 60 days of the date they are appointed unless the court grants them an additional 30 days, and that the Amended motion, which was filed on August 28, 2013, was past due and untimely filed in light of the “appointment date” and the provisions of Rule 29.15(g). (A20-A22).

The Eastern District clearly erred in finding that the motion court appointed the public defender’s office to represent Mr. Creighton on his Rule 29.15 motion on March 8, 2013, and consequently, also clearly erred in finding that Mr. Creighton’s Amended Motion was untimely filed. The fact is that the motion court did not appoint the public defender’s office to represent Mr. Creighton on his Rule 29.15 motion on March 8, 2013. The only thing the motion court did on March 8, 2013 was notify the public defender’s office that Mr. Creighton had filed a post-conviction motion and provide the public defender’s office with an affidavit in which Mr. Creighton claimed to be indigent. (P.C.R.L.F. 2). A review of the docket sheets from 1322-CC00229 shows that the motion

⁵ In relevant part, Rule 29.15(g) states as follows: “If an appeal of the judgement sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters and appearance on behalf of movant. The Court may extend the time for filing the amended motion for one additional period not to exceed thirty days.” Rule 29.15(g).

court that presided over Mr. Creighton's Rule 29.15 motion made the following docket entry on March 8, 2013:

"The Court hereby **notifies** Scott Thompson Appellate District Defender that Movant Rodney Creighton has filed a post-conviction. The motion is accompanied by an affidavit of indigency."

(P.C.R.L.F. 2). In making this docket entry, the motion court used the word "notifies" and did not use the word "appoints." (P.C.R.L.F. 2). Clearly, in making this docket entry, the motion court's intent was to notify and not to appoint. This is particularly true given that there was an "Amended Administrative Order" in place in the motion court's circuit which had gone into effect on December 21, 2012 and which specifically decreed that the courts of that circuit would stop appointing the public defender as post-conviction counsel and would instead give notice to the public defender of any post-conviction filing under Rules 24.035 and 29.15. (see A31 in particular and A39-A32 in general).

The Eastern District ignored the fact that the motion court's docket entry of March 8, 2013 clearly indicated that the motion court was simply notifying Scott Thompson that Mr. Creighton had filed a post-conviction case and found that this docket entry amounted to a de facto appointment order. (A20-A22). In support of its finding that the motion court's docket entry of March 8, 2013 amounted to a de facto appointment order, the Missouri Court of Appeals for the Eastern District pointed out the fact that Rule 29.15(e) states that "[w]hen an indigent movant files a pro se motion, the court shall cause

counsel to be appointed for the movant” and relied heavily on the following quotation from this Court’s opinion in Stanley v. State⁶:

“the effective date of appointment of counsel is the date on which the office of the public defender is designated rather than the date of counsel's entry of appearance.”

(A21). Essentially, the Eastern District found that because the motion court had a duty under Rule 29.15(e) to cause counsel to be appointed for Mr. Creighton and because Stanley v. State had held that the effective date of appointment of counsel is the date on which the office of the public defender is designated rather than the date of counsel’s entry of appearance, the motion court’s March 8, 2013 docket entry, which on its face, merely purported to notify the public defender’s office that Mr. Creighton had filed a post-conviction motion, amounted to a de facto appointment order triggering the time constraints of Rule 29.15(g) for the filing of an Amended Motion. (A20-A22).

Mr. Creighton submits that the Eastern District misplaced its reliance on the aforementioned quotation from this Court’s opinion in Stanley v. State because the facts of Stanley v. State are factually distinguishable from Appellant’s case. In Stanley v. State, the motion court clearly intended to appoint the public defender and did so. Stanley v. State, 420 S.W.3d at 532-549. In Mr. Creighton’s case, the motion court did not intend to appoint the public defender and did not do so. As such, the cases are not analogous.

Mr. Creighton also submits that the Eastern District reads Rule 29.15(e) too narrowly. That rule does say that “when an indigent movant files a pro se motion, the

⁶ Stanley v. State, 420 S.W.3d 532, 540 (Mo. Banc. 2014)

court shall cause counsel to be appointed for the movant.” Rule 29.15(e). However, Rule 29.15(e) is silent as to how the motion court should cause counsel to be appointed leaving that to the discretion of the motion court. Moreover, § 600.086.3 RSMo specifically states the following:

The determination of indigency of any person seeking the services of the state public defender system shall be made by the defender or anyone serving under him at any stage of the proceedings. Upon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant. Upon the courts finding that the defendant is not indigent, the public defender shall no longer represent the defendant. Any such person claiming indigency shall file with the court an affidavit which shall contain the factual information required by the commission under rules which may be established by the commission in determining indigency.

§ 600.086.3 RSMo. As such, it may be true that a motion court has authority pursuant to Rule 29.15(e) to appoint counsel for any post-conviction movant who fills out an affidavit of indigency. However, it is also true that a motion court has discretion pursuant to Rule 29.15(e) and § 600.086.3 RSMo to notify the public defender’s office that a post-conviction movant has filed a post-conviction motion and to permit the public defender’s office to undertake the tasks of determining whether the movant is actually indigent and appointing counsel for those who it determines to be indigent or notifying

the motion court that the movant is not indigent and declining to appoint counsel for the movant. Either way, the motion court is discharging its duties under Rule 29.15(e).

Finally, Mr. Creighton submits that the Eastern District's opinion in ED102030 is contrary to the Southern District's opinion in Laub v. State⁷, and that this Court should adopt and apply the same reasoning that the Southern District applied in Laub v. State to this case. In Laub v. State, the Missouri Court of Appeals for the Southern District found that the court that presided over Mr. Laub's Rule 29.15 Motion did not appoint the public defender's office and instead notified the public defender's office because the court had made it clear that it was notifying and not appointing. Laub v. State, 481 S.W.3d at 583-585. And if you really compare the facts of Mr. Creighton's case to Mr. Laub's case, they are factually indistinguishable. In both cases, the respective motion courts opted to notify rather than to appoint in order to assist the public defender's office with caseload concerns. See Laub v. State, 481 S.W.3d at 583-585 and P.C.R.L.F. 2. Hence, Mr. Creighton's case is factually indistinguishable from Laub v. State and yet the opinion in Laub v. State is clearly contrary to the opinion in Mr. Creighton's case. It's just the Eastern District overlooked the motion court's intent and the Southern District did not.

Ultimately, Mr. Creighton requests this Court to find that the motion court's order of March 8, 2013 was not an appointment order and that the Amended Motion that was filed in that case was timely filed because Undersigned Counsel was granted an extra thirty days to complete the Amended Motion and the Amended Motion was filed within 90 days of the date he entered as required by Rule 29.15(g).

⁷ Laub v. State, 481 S.W.3d 579 (Mo. App. S.D. 579).

POINTS RELIED ON

I.

The motion court clearly erred in denying Appellant an evidentiary hearing on his Rule 29.15 claim that his trial attorney was ineffective for failing to seek a mistrial or, in the alternative, removal of juror 510, Pearlie Turner, for intentional nondisclosure because this ruling violated Appellant's constitutionally protected rights to due process, to a fair trial, and to the effective assistance of counsel, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, in that, in making the claim, Appellant's Amended Motion alleged facts which warranted a hearing. Those facts warranted a hearing because: a) they alleged facts, not conclusions, warranting relief; b) the facts alleged raised matters not refuted by the files and records in the case; and c) the matters complained of resulted in prejudice to Appellant.

State v. Hill, 412 S.W.3d 281 (Mo. App. E.D. 2013)

State v. Ess, 453 S.W.3d 196 (Mo. Banc. 2015)

Mo. Const., Article I, §§ 10 and 18(a)

U.S. Const., Amends. VI and XIV

II.

The motion court clearly erred in refusing to review the claims raised in Appellant's pro se Rule 29.15 Motion, a copy of which was attached to Appellant's Amended Motion, because this action violated Appellant's constitutionally protected rights to due process of law as guaranteed by article 1, section 10 of the Missouri Constitution and the 14th Amendment to the United States Constitution, in that Undersigned Counsel specifically requested the motion court to review the claims contained in Appellant's pro se Rule 29.15 Motion and physically attached a copy of Appellant's pro se Rule 29.15 Motion to the Amended Motion.

Reynolds v. State, 994 S.W.2d 944 (Mo. Banc. 1999)

Mo. Const., Article I, § 10

U.S. Const., Amends. XIV

ARGUMENT

I.

The motion court clearly erred in denying Appellant an evidentiary hearing on his Rule 29.15 claim that his trial attorney was ineffective for failing to seek a mistrial or, in the alternative, removal of juror 510, Pearlie Turner, for intentional nondisclosure because this ruling violated Appellant’s constitutionally protected rights to due process, to a fair trial, and to the effective assistance of counsel, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, in that, in making the claim, Appellant’s Amended Motion alleged facts which warranted a hearing. Those facts warranted a hearing because: a) they alleged facts, not conclusions, warranting relief; b) the facts alleged raised matters not refuted by the files and records in the case; and c) the matters complained of resulted in prejudice to Appellant.

Standard of Review

Appellate review of a denial of a Rule 29.15 motion for post-conviction relief is limited to determining whether the motion court’s “findings of fact and conclusions of law are clearly erroneous.” Greer v. State, 406 S.W.3d 100, 104 (Mo. App. E.D. 2013) (quoting Worthington v. State, 166 S.W.3d 566, 572 (Mo. banc. 2005)). An appellate court will deem a motion court’s findings of fact and conclusions of law clearly erroneous only if a full review of the record leaves it with a definite and firm impression that a mistake has been made. Greer v. State, 406 S.W.3d at 104.

Pursuant to Rule 29.15, an evidentiary hearing is not required “[i]f the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief[.]” Greer v. State, 406 S.W.3d at 104 (quoting Rule 29.15(h)). Accordingly, the motion court is only required to grant an evidentiary hearing on a Rule 29.15 motion for post-conviction relief if the movant satisfies three requirements: (1) the movant must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant. Greer v. State, 406 S.W.3d at 104.

When a requested evidentiary hearing involves a claim of ineffective assistance of counsel, the movant must show by a preponderance of the evidence both that the counsel's performance failed to conform to the degree of skill, care and diligence of a reasonably competent attorney and that such deficiency prejudiced the movant. Id. (citing Dickerson v. State, 269 S.W.3d 889, 892 (Mo. banc. 2008); Strickland v. Washington, 466 U.S. 668, 687 (1984); and Rule 29.15(i)). First, the performance component requires counsel to exercise the “skill and diligence that a *reasonably* competent attorney would exercise under similar circumstances.” Id. (quoting Sanders v. State, 738 S.W.2d 856, 858 (Mo. banc. 1987) (quoting Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984))). Because the Appellate court reviews the reasonableness of trial counsel's conduct not from hindsight but from counsel's perspective at the time of trial, movant must overcome a “strong presumption” that the trial counsel's performance was reasonable and effective. Greer v. State, 406 S.W.3d at 104. Second, the prejudice prong requires movant to show

that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Greer v. State, 406 S.W.3d at 105.

Argument

The motion court clearly erred in denying Appellant an evidentiary hearing on his Rule 29.15 claim that his trial attorney was ineffective for failing to seek a mistrial or, in the alternative, removal of juror 510, Pearlie Turner, for intentional nondisclosure. In denying Appellant an evidentiary hearing on this claim, the motion court said the following:

This Courts finds this claim is without merit as movant has not alleged any facts that would support a finding that a mistrial would have been granted or an alternate juror should have substituted. The fact a person may have seen somebody else at some unknown place does not mean the person 'knows' that other person such that a response to the question asked during voir dire would have been necessary.

(P.C.R.L.F. 82). These findings are clearly erroneous.

Appellant's Amended Motion clearly pled sufficient facts to warrant a hearing on his claim that his trial attorney was ineffective for failing to seek a mistrial, or in the alternative, removal of juror 510, Pearlie Turner, for intentional nondisclosure. In his Amended Motion, Appellant alleged that after closing arguments and while the jury was deliberating, a deputy sheriff advised the trial court that the foreman of the jury, not juror 510, but the foreman of the jury, had informed him that juror 510, Pearlie Turner, knew Appellant. (P.C.R.L.F. 43). In addition, Appellant's Amended Motion alleged that the

trial court subsequently questioned juror 510 about how she knew Appellant and that juror 510 responded by saying that she thought she had seen Appellant before and that his face looked familiar to her, but she didn't know him by name and didn't know where she'd seen him before. (P.C.R.L.F. 43). The Amended Motion also alleged that the prosecutor had asked the jury panel if anyone knew Appellant during voir dire, that no one responded to this question, and that Appellant's trial attorney relied on this exchange in determining that there was no need to ask follow up questions designed to help her decide whether to seek strikes for cause based on familiarity with Appellant and in determining that there was no need to use peremptory strikes on jurors who were familiar with Appellant. (P.C.R.L.F. 43). Appellant's Amended Motion also asserted that in State v. Hill, the Missouri Court of Appeals for the Eastern District said:

The right to a fair and impartial jury requires potential jurors to fully and truthfully answer questions during voir dire in order to ensure that a defendant can properly exercise challenges for cause and peremptory strikes. State v. Griffith, 312 S.W.3d 413, 417 (Mo. App. SD 2010). Intentional juror nondisclosure occurs when: (1) there is no reasonable inability to comprehend the information solicited by the question asked; and (2) the venireperson remembers the experience or it was of such significance that any purported forgetfulness is unreasonable. State v. McFadden, 391 S.W.3d 408, 418 (Mo. Banc. 2013). A finding of intentional nondisclosure of a material issue is tantamount to a per se rule

mandating a new trial. Id. [State v. Hill, 412 S.W.3d 281, 284 (Mo. App. E.D. 2013)].

(P.C.R.L.F. 43). The Amended Motion went onto to assert the following:

Accordingly, it is clear that Movant's attorney should have recognized that Juror Turner's conduct amounted to an intentional nondisclosure and requested a mistrial, or in the alternative, that Juror Turner be excluded as a juror. Juror Turner was present in the courtroom during voir dire and simply failed to respond when the prosecutor asked the jury panel whether anyone knew Movant. In addition, Juror Turner had the opportunity to look at Movant throughout jury selection and throughout the jury trial and yet she never once disclosed the fact that she thought she knew Movant to the prosecutor, to Movant's attorney, to the Court, or to any Court personnel. And it was not until the *foreman* told the deputy sheriff that Juror Turner knew Movant that the issue came to light. So clearly, Juror Turner was discussing the fact that she knew Movant with other jurors and just simply didn't inform the prosecutor or Movant's attorney or the Court or Court personnel about it. This wrecks of deception and impropriety.

Movant's attorney should have requested a mistrial, or in the alternative, removal of Juror 510, Pearlie Turner for this intentional nondisclosure. Had she done so it would have been granted (and if not, the issue would have been preserved for direct appeal). Unfortunately, Movant's attorney did not do so. And in failing to do so, Movant's attorney failed to exercise

the skill, care, and diligence that a reasonably competent attorney would have exercised under similar circumstances. Moreover, Movant was prejudiced. There was no mistrial. Instead, Movant had his fate decided by someone who knew him, but did not disclose that fact when asked about it. And as noted in State v. Hill, prejudice is presumed from intentional nondisclosure. [State v. Hill, 412 S.W.3d at 284].

(P.C.R.L.F. 44-45).

Ultimately, Appellant's Amended Motion alleged facts showing that his trial attorney was ineffective in that he failed to request a mistrial, or in the alternative, removal of juror 510, Pearlie Turner, despite the fact that she committed juror misconduct in the form of intentional nondisclosure when she failed to respond to a question posed by the prosecutor during voir dire as to whether anyone knew Appellant. Moreover, these facts were not refuted by the record and if proven, would demonstrate prejudice and warrant relief. (see State v. Ess, 453 S.W.3d 196, 200-206 (Mo. Banc. 2015) (holding that prejudice is presumed from intentional non-disclosure and reversing Ess's convictions in part for intentional nondisclosure in a case where a juror failed to respond during voir dire when the jury panel was asked whether they had any preconceived notions of the case and subsequently told other jurors that the case was an open and shut case)). As such, Appellant was entitled to an evidentiary hearing on the claim. (see generally Greer v. State, 406 S.W.3d at 104 (holding that the motion court is only required to grant an evidentiary hearing on a Rule 29.15 motion for post-conviction relief if the movant satisfies three requirements: (1) the movant must allege facts, not

conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant)).

II.

The motion court clearly erred in refusing to review the claims raised in Appellant's pro se Rule 29.15 Motion, a copy of which was attached to Appellant's Amended Motion, because this action violated Appellant's constitutionally protected rights to due process of law as guaranteed by article 1, section 10 of the Missouri Constitution and the 14th Amendment to the United States Constitution, in that Undersigned Counsel specifically requested the motion court to review the claims contained in Appellant's pro se Rule 29.15 Motion and physically attached a copy of Appellant's pro se Rule 29.15 Motion to the Amended Motion.

Argument

When he filed the Amended Motion in 1322-CC00229, Undersigned Counsel physically attached a copy of Appellant's pro se Rule 29.15 Motion and specifically requested the motion court to review the claims raised therein. (P.C.R.L.F. 34-75). The motion court refused to do so and claimed that the copy of Appellant's pro se Rule 29.15 Motion that was physically attached to Appellant's Amended Motion was illegible. (P.C.R.L.F. 82-83). This was clearly erroneous for two reasons: 1) the copy of Appellant's pro se Rule 29.15 Motion that was physically attached to Appellant's Amended Motion was not so illegible that the motion court could not review the claims and they should have been reviewed (see Reynolds v. State, 994 S.W.2d 944, 946 (Mo. Banc. 1999)), and 2) even if the copy of Appellant's pro se Rule 29.15 Motion that was physically attached to Appellant's Amended Motion was so illegible that the motion court could not review the claims contained therein, the motion court had a the original

copy of Appellant's pro se Rule 29.15 Motion and that original copy was completely legible. (P.C.R.L.F. 3-29).

CONCLUSION

WHEREFORE, for the reasons set forth herein, Appellant prays this Honorable Court to find: a) that the motion court erroneously denied Appellant's request for an evidentiary hearing as to his claim that his trial attorney was ineffective for failing to request a mistrial, or in the alternative, seek removal of juror 510, Pearlie Turner for intentional nondisclosure, and b) that the motion court should have reviewed the claims raised in Appellant's pro se Rule 29.15 Motion as they were physically attached to Appellant's Amended Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2016, an electronic version of this brief was sent via the Missouri E-filing System to the Court and to Ms. Christine Lesicko, assistant attorney general, Office of the Attorney General.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify I signed the original copy of this brief, that this brief conforms with Rule 84.04, that this brief contains all the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words. The word-processing software identified this brief as containing 6,529 words and 31 pages including the cover page, signature block, and certificates of service and of compliance.

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